BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BRYAN WESTERN CLARK	)	
Claimant	)	
	)	
VS.	)	
	)	
PLAZA NINE LTD OF KANSAS INC.	)	
Respondent	)	Docket No. 1,048,903
	)	
	)	
WORKERS COMPENSATION FUND	)	

ORDER

Claimant requests review of the March 10, 2010 preliminary hearing Order entered by Administrative Law Judge John D. Clark (ALJ).

ISSUES

The ALJ specifically found that "[a]t the time of his injuries, the [c]laimant was off the clock and not working." He went on to conclude that claimant had "not proven that he was injured out of and in the course of his employment with the [r]espondent".[1] Accordingly, he denied claimant's request for compensation under the Kansas Workers Compensation Act (Act).

The claimant requests review of this decision alleging that the ALJ erred in his conclusion that claimant's injuries did not arise out of and in the course of his employment with respondent. Claimant's brief to the Board also asserts that claimant sufficiently established that he was an employee (as opposed to an independent contractor) and that respondent was subject to the Act by virtue of its payroll payments in 2009.

[1] ALJ Order (Mar. 10, 2010).

The respondent Plaza Nine Ltd of Kansas, Inc. (Plaza Nine)[2] did not file a brief nor are they represented by counsel in this matter. Instead, its president, Jo Zakas appeared at the hearing. The Kansas Workers Compensation Fund (Fund) contends the ALJ's Order should be affirmed. In addition, the Fund maintains the Act does not apply to this accident inasmuch as respondent's payroll does not breach the statutory threshold set forth in K.S.A. 44-505. Lastly, respondent also argues that claimant is precluded from receiving benefits due to his alcohol consumption and resulting presumptive impairment, as provided in K.S.A. 44-501.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

The underlying facts surrounding this claim are largely undisputed. Claimant was originally hired as an independent contractor, hired to perform web development services and logo design for respondent's new business venture, Clifton Wine & Jazz. This work was done pursuant to a written agreement in which respondent's owner and president, Jo Zakas, and claimant agreed he was an independent contractor. At some point claimant volunteered to work as a bartender one night a week.[3] Ms. Zakas agreed to pay claimant $8 or $10 per hour for this work and claimant was specifically directed to clock in and out for those hours he spent as a bartender. When a manager left respondent's employ, claimant began working more shifts.[4] He ultimately began working, on average, 20 hours per week.[5] According to claimant, he would both manage and bartend one or two nights per week, on an "ad hoc" basis.[6] He considered Jo Zakas his boss.[7]

Jo Zakas, the president of Plaza Nine, confirms that claimant was a web developer and worked for and was paid by the company on a contract basis. She testified that she retained claimant to serve as a bartender/manager because he was a professional, and had management experience. She never told him what to wear or how to be a bartender. She also confirmed that he would hire and occasionally fire employees for the bar. But she required him to clock in and out as she wanted to keep track of how much she was paying

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[2] Although the pleadings within the court file are inconsistent, it appears that the appropriate respondent is Plaza Nine Ltd of Kansas, Inc. d/b/a Clifton Wine & Jazz.

[3] P.H. Trans. at 8.

[4] *Id.* at 7.

[5] *Id.* at 17.

[6] *Id.* at 9.

[7] *Id.* at 10.

him and did not want that expense (for his time) to exceed $800 per month.[8] She further testified that she could, at any time, tell claimant she no longer desired his services.[9]

According to Ms. Zakas, Plaza Nine is a company that owns and operates three other businesses. Clifton Square, Barrington Elms, and as of May 2009, Clifton Wine & Jazz. Plaza Nine paid only $645 in wages during 2007 and $10,006 in 2008. Then, in 2009, when Clifton Wine & Jazz was opened, the wages increased. The tax returns which were produced during the preliminary hearing show that $14,305.14 in wages were paid primarily on the bar employees from May 2009 (when the bar opened) to the end of the year. And that figure does not include the monies paid to claimant or to Jo Zakas, as president.[10] The entire payroll for 2009, without claimant's payments, was in excess of $26,000. Claimant alone was paid $5,075.53 in 2009 for the period June 16, 2009 to December 14, 2009, and no withholdings were taken from these funds.[11] Thus, for calendar year 2009, respondent's payroll exceeded $30,000. Clifton Wine & Jazz does not (apparently) file separate tax returns as it is a fictitious entity owned and operated by Plaza Nine, the respondent herein. Thus, for purposes of determining payroll under K.S.A. 44-505, those are the numbers that must be considered.

On December 5, 2009, claimant clocked out from working. He had worked a few hours that day and decided to stay and have a drink. It is clear from the evidence that he was not on the clock, had finished all of his work duties for the day and was engaged in a purely social, personal activity. According to claimant, he opened a tab and consumed a single gin and tonic and a glass of wine while sitting at the bar and was served by Michelle Monroe. There is some evidence that claimant had as many a 6 gin and tonics. And while he does not deny having 6 gin and tonics, claimant testified that the only alcohol he remembers consuming came from a single gin and tonic and a glass of wine. At some point in the evening, a customer came up to him and complained about the temperature in the room. Claimant concedes no one told him to help this customer, nor does he know if anyone directed the customer to him. But according to claimant, it was his personal policy to do what he could to help the public.

Claimant testified that he got up from the bar, walked to the steps to the basement so he could adjust the thermostat.[12] He apparently took a single step and fell to the bottom

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[8] *Id.* at 28.

[9] *Id.* at 34.

[10] Ms. Zakas was never asked how much she earned as president of respondent.

[11] Although respondent has designated these monies as paid for "contract labor" that arbitrary designation is not necessarily determinative.

[12] P.H. Trans. at 10-11.

of the flight of steps. He was unconscious and emergency assistance was called. He alleges he injured his back, neck, left shoulder and sustained a closed head injury.

After his accident, Jo Zakas investigated the circumstances surrounding the claimant's fall. She testified that she did not expect claimant to help the customers by adjusting the thermostat. She further testified that she retrieved claimant's tab from that night and according to "Heather" the bartender, claimant was served 6 gin and tonics at a cost of $42. Ms. Zakas testified that she saw the charge for the drinks, but did not produce any documentation to support this fact. And when cross examined about the list of employees and the identity of the waitress that was serving claimant, she admitted that she might have the name of the waitress wrong as there was no employee listed by the name of "Heather" on the payroll list. She also conceded that her list of employees was possibly incomplete and that she did not keep track of the tips paid to the waitresses.

After hearing the evidence, the ALJ denied claimant's request for benefits under the Act. Although he did not expressly so find, it is implicit in his Order that he found that respondent was subject to the Act (based on a sufficient payroll) and that claimant was respondent's employee (as opposed to an independent contractor) as he mentions the fact that claimant was "off the clock and not working". However, the ALJ made no mention of the respondent's assertion that claimant was presumptively impaired under K.S.A. 44-501 and therefore not entitled to benefits. Because the ALJ did not make any findings with respect to this defense,[13] the Board will not address the parties' arguments on this issue.

The remaining issues are 1) whether claimant is an employee, as opposed to an independent contractor; 2) whether respondent is subject to the Act under K.S.A. 44-505; and 3) whether claimant's injuries arose out of and in the course of his employment with respondent.

As noted earlier, the ALJ must have concluded both that claimant was an employee and that respondent had a sufficient payroll such that it was subject to the rights and duties provided for under the Act. Claimant acknowledges that the Act places the burden of proof upon him to establish the right to an award of compensation and to prove the conditions on which that right depends.[14] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[15]

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[13] In light of the ALJ's conclusion, there was no need to address the alcohol defense, as it was moot based on the ALJ's denial of claimant's request for benefits.

[14] K.S.A. 2009 Supp. 44-501(a).

[15] K.S.A. 2009 Supp. 44-508(g).

The primary test utilized in Kansas to determine whether an employee/employer relationship exists is whether the employer has the right of control and supervision of the work of the employee. This involves the right to direct the manner in which the work is performed as well as the result which is to be accomplished. It is not the actual exercise of control, but the right to control which is determinative.[16]

Here, this member of the Board is persuaded that claimant is, in fact, an employee of respondent's when he is performing the duties of a bartender/manager. Both claimant and Jo Zakas agree that she had the power to fire him at will. Although she couches this in terms of an independent contractor relationship, the facts belie this assertion. While it is true that she did not train claimant, or require him to wear a uniform, she nonetheless required him to clock in and out, she paid him on an hourly basis, she scheduled his work hours, limited the number of hours he was to work (not exceeding $800 per month) and she had the ultimate power to fire him. The fact that the parties had a separate written agreement which governed claimant's duties with respect to web development is of no consequence to his status as an employee while working as a bartender for respondent. Thus, this Board Member finds the ALJ's implicit conclusion that claimant was an employee is affirmed.

This Board Member is likewise persuaded that respondent Plaza Nine is subject to the provisions of the Act. It is claimant's burden to prove coverage under the Act, whether respondent has the requisite payroll requirements as set forth in the Act.[17] K.S.A. 44-505(a)(2) exempts from application of the Act the following:

> (2) any employment, . . . wherein the employer had a total gross annual payroll for the preceding calendar year of not more than $20,000 for all employees and wherein the employer reasonably estimates that such employer will not have a total gross annual payroll for the current calendar year of more than $20,000 for all employees, except that no wages paid to an employee who is a member of the employer's family by marriage or consanguinity shall be included as part of the total gross annual payroll of such employer for purposes of this subsection;

This statute's references to "current calendar year" have been interpreted to mean the year the accident occurs and "preceding calendar year" refers to the calendar year immediately before the year of the accident.[18]

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[16] *McCubbin v. Walker*, 256 Kan. 276, 886 P.2d 790 (1994); *Falls v. Scott*, 249 Kan. 54, 815 P.2d 1104 (1991); and *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

[17] *Brooks v. Lochner Builders, Inc.*, 5 Kan. App. 2d 152, 613 P.2d 389 (1980).

[18] *Slusher v. Wonderful Chinese Restaurant, Inc.* 42 Kan. App. 2d 831, 217 P.3d 11 (2009).

Under these facts, respondent's payroll in 2008 did not exceed the $20,000 threshold undoubtedly because the wine bar had yet to come into existence. But as of 2009, the year of the accident, respondent's payroll did, in fact, well exceed the $20,000 threshold, taking into account not only the monies admittedly paid but the monies paid to claimant as well. Inasmuch as this member has concluded that claimant is an employee, his wages need to be included in these calculation. And because the 2009 payroll exceeded the threshold, respondent is subject to the mandates of the Act. Thus, the ALJ's implicit finding that respondent was covered by the Act is affirmed.

Turning now to the question involving the underlying compensability of claimant's injuries, the ALJ concluded that claimant failed to prove "that he was injured out of and in the course of his employment with the [r]espondent."[19]

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[20] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[21] The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[22]

Under these facts, this Board Member concurs with the ALJ's analysis of the facts and his ultimate conclusion that claimant failed to establish that his accident arose out of and in the course of his employment. At the time of his fall, claimant was off the clock, and was nothing more than a paying customer. His employer did not ask him to respond to

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[19] ALJ Order (Mar. 10, 2010).

[20] K.S.A. 2009 Supp. 44-501(a).

[21] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

[22] *Id.*

request from the other patrons, nor was he under any obligation to do so. For these reasons, the ALJ's Order is hereby affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.[23] Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge John D. Clark dated March 10, 2010, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June 2010.

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JULIE A.N. SAMPLE
BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
Thomas Arnhold, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge

[23] K.S.A. 44-534a.